A REPLY TO A PAPER, INTITULED,

A True Account of the Unreasonableness of Mr. Fitton's *Pretences against the Earl of* Macclesfield.

15. Oct. 1685.

Whereas that Paper calls Mr. *Fitton* a remote Kinsman; Observe, the Relation stands thus, Sir *Edw. Fitton*, Treasurer of *Ireland*, had Issue Sir *Edw. Fitton*, and *Alexander*; Sir *Edward* was Grand-father to the last Sir *Edward*, and *Alexander* was Grand-father to the Petitioner.

IT is alledged in the Paper, That Mr. *Fitton* had been but Four Years in Possession, and that before that time the Earl of *Macclesfield* was in possession by vertue of the Will.

As to the *Fitton*'s Possession, the Case stands thus: Sir *Edward Fitton* died in 1643. In 1647. *William Fitton* recovered the Possession of the Mannor of *Alford* and *Gawsworth*-Park, which was all the Estate that was not in Mortgage or Jointure. In 1652. the Mortgage was redeemed by Mr. *Fitton*, and about 1655. the Jointress died, and from that time he had possession of that part of the Estate also.

As to the Earl's *prior* Possession, the Fact is thus: He, together with the other Co-heirs, upon the death of Sir *Edward Fitton*'s Mother, did enter upon *Alford*, and receiv'd his seventh part of the Profits, as one of the Co-heirs, till the *Fittons* recovered the Estate from them; which is so far from being a Possession under the Will, that it is a demonstration he did not then believe there was any such. And for many years in many Suits between the Co-heirs and the *Fittons*, as well when they were Plaintiffs as Defendants, the Earl was joined with them.

The 2*d* Matter alledged is, That the *Chancery* did no wrong to *Fitton*, by not suffering him to try the Title to the Will, because upon his Answer he never contested it.

The falsity of this Allegation appears by the Words of the Answer; *And these Defendants say, That they nor either of them Know or Believe, that Sir* Edw. Fitton *did make his Will in Writing, in the Bill mentioned, pretended to bear date*, &c. Which is a plain denial of it, and that the Earl took it to be so, is as plain by his endeavouring to prove the Will in the Cause.

The 3*d* Allegation in the Paper is A pretended Anſwer to that which ever was and ever will be required in all Courts of Law and Equity, That the Plaintiff muſt make out his own Title, before he be admitted to controvert the Title of the Defendant, who is in poſſeſſion. And therefore the Earl's Title being a Title at Law under the Will, which was deviſed, he ought to have made out that Title at Law, before he ſhould have been admitted to controvert the Deed-Poll, which was part of the Defendant's Title.

The next thing is, A cunning Inſinuation, as if to aſſert the Deed-Poll were a Reflection on the Judgments of the *Houſe of Lords*, given upon the Earl's complaint againſt *Fitton* and *Granger* about the Libel; which is a meer Fallacy, for that Paper might be juſtly cenſur'd as a Libel, and the publiſhing of it as a Crime, tho' every word of it was true, becauſe it was not aſſerted in a legal Courſe. And it is moſt true, that the Verdict was given upon *Granger*'s Evidence, and upon that of his Servants or Companions, who ſwore what *Granger* told them.

In Anſwer to the pretended Circumſtances, *to prove the* FORGERY;

1. There was no occaſion to produce the Deed-Poll at any of the Tryals, with the Co-heirs, becauſe *Fitton*'s Title was under the Settlement, which they never pretended to be revoked.

2. There was no cauſe to produce it upon the Marriage-Treaty, for Mr. *Fitton*'s Wife's Relations looked on his Title as undoubted, he being in poſſeſſion upon three Judgments at Law, ſo that no Deeds at all were produced, but the Marriage took effect upon Articles.

3. *William Jolliffe*, Eſq; a Gentleman of Quality and undoubted Reputation, and divers others, proved, That they ſaw the Deed-Poll ſome years before the time that *Granger* ſwore he forged it.

4. As to the pretence, That *Fitton*'s Father knew nothing of the time, 'tis falſe, and affirm'd without proof.

5. The Witneſſes to the Deed-Poll, *Rich. Davenport*, Eſq; *Tho. Smalwood*, and *Edw. Barwick*, Gent. were perſons of ſuch Credit, that the Earl never went about to impeach it. They, upon their Examination in the Cauſe in Chancery, ſwore, *That they were preſent, and ſaw Sir* Edw. Fitton *Seal and Deliver, as his Act and Deed, the ſaid Deed then ſhewn to them, and that their Names endorſed on the Deed was their proper Hand-writing.* Now 'tis not probable, that Witneſſes Names, who were all living, and ſtrangers to *Fitton*, ſhould be put to a Deed, ſuppoſed to be forged twenty years after the pretended Date.

6. 'Tis not at all ſtrange, that they ſhould not on the ſudden recollect the time and place of executing the Deed, it being after 20 Years, and they having been Witneſſes to divers Deeds ſeal'd by Sir *Edw. Fitton.*

8. All the three Witneſſes did afterwards recollect themſelves, and frequently in their Life-time, and ſeverally on their Death-beds, declared, they perfectly remembred the Time and the preciſe Place where the Deed was ſeal'd, *viz. In the Compaſs-Window in the Hall in* Gawſworth-*houſe*. Therefore let any Man that can believe that Mr. *Davenport* asked Pardon for ſwearing that he was a Witneſs to the Executing the Deed, when he died affirming it.

9. As to the nature of *Granger*'s Evidence, If it were true, he muſt be a great Villain, and guilty of Forgery, and 'tis conſiderable what Credit he ought to have who ſwears himſelf at that inſtant to deſerve none. And *Granger* himſelf, from the time of that Tryal till his Death, which was very lately, own'd, That he never ſaw *Fitton* till the Morning when the Tryal was had, and that one was then employ'd to ſhew him *Fitton*, as he came into *Weſtminſter-hall.* And at his Death confeſs'd, That of all the Villanies of his Life, that which troubled him moſt was the wrong he had done *Fitton*, in ſwearing he forged the Deed-Poll, of which there are many Witneſſes beyond all exception. And if *Granger* could deſerve Credit, in behalf of the Earl, after he had own'd himſelf guilty of Forgery, he may be allow'd to Deſerve as much Credit, in behalf of *Fitton*, after he had been guilty of Perjury; Eſpecially when the very perſons concerned in ſuborning *Granger*, and who paid him for it, confeſs their knowledge of the Fact.

10. As

10. As to what the Anſwer calls an Evidence from the nature of the thing, that it was improbable Sir *Edw. Fitton*, who was married, and in a poſſibility of having Children, ſhould releaſe his Power of Revocation. It is to be obſerved, That Sir *Edward* continued Tenant in Tail after the Releaſe, and ſo might cut off the Remainders by a Recovery, if he had Iſſue; but 'tis probable, it was done to prevent any ſudden act he might be prevail'd upon to do, to the prejudice of his Heir-Male, by the Importunity of his Siſters, who were his Heirs; and alſo to eſtabliſh and ſtrengthen his Settlement, (the Times growing ill, and he being about to enter into the War) which would have ſignified nothing, as to the ſaving his Eſtate in his Family, if he had had a power to revoke it.

In Anſwer to the fifth Objection, 'tis plain, the Poſſeſſion, and Deeds and Account of the Profits, were Decreed before any Tryal was had upon the Will, and before the Tryal which the Chancery it ſelf thought fit to allow, which was plainly before the Cauſe was Determined. 'Tis alſo evident, that the Deed was at firſt ſent with prejudice to be Tryed, for it was called a pretended Deed.

Nothing can be more frivolous than the ſixth Allegation, that the Right of Inheritance was not touch'd, but only the Perſon bound by the Decree. For all Deeds were taken from Mr. *Fitton*, together with the Poſſeſſion, and the Deed-Poll Cancelled, and he Decreed to have no farther Tryal, and he that has no Remedy, has no Right, or at leaſt his Right can do him no good.

Whether the Court of Chancery has exceeded their Power, is now the Queſtion before the Lords; and therefore to draw Arguments from the Judgment of the Lord Chancellor or Lord Keeper, is begging the Queſtion, and is indeed to make an Argument: Which if it have any force at all, will indifferently ſerve againſt all Appeals to the Lords, the Juriſdiction of this Great Court being founded upon a ſuppoſition that Chancellors and Keepers may miſtake. Beſides, the now Lord Keeper, being prevented by a Plea and Demurrer, could never look into the Proofs in the Cauſe.

That the Decree is larger than the Plaintiffs Petition will be obvious to any Perſon who looks on both, nothing is pray'd, but to ſet aſide the Leaſe, and to be at Liberty to examine Witneſſes to the Will. But the Decree is for the Poſſeſſion, for an Account of Profits, for Delivering up and Vacating Deeds, and does exclude the Defendant from Trying his Right at Law for the future.

The pretended Anſwer divides the Proofs of the Will into three Heads.

As to the firſt, which mentions Sir *Edward*'s Intention, to ſettle his Eſtate on the Earl of *Macclesfield*, Mr. *Manwairing*, the firſt Perſon named, had for many Years together been in Suit; which Mr. *Fitton*, as one of the Co-heirs of Sir *Edward*, and therefore could not believe there was a Will. And Sir *John Trevor*, Mr. *Davenport*, and other Perſons of undoubted Credit, did fully prove in the Cauſe, that Sir *Edward* did ever intend to keep the Eſtate in the Name, and to ſettle it on *William Fitton*, and ſent for him out of *Ireland* for that purpoſe, and declared, that rather than a *Fitton* ſhould not have it, he would leave it to *Ned Fitton* the Bang-beggar. Nor could Sir *Edward Fitton* conceive any prejudice againſt *William Fitton*, becauſe he was engaged in the *Iriſh* or *Engliſh* Rebellion, ſince 'tis utterly falſe, that he was engaged in either, being well known to be a Gentleman of very Loyal Principles. And *Philip Pritchard*, Eſq; *Ralph Jamon* and *Thomas Cowley*, *William Sweetenham*, *Edmund Barwick*, *Edward Gardiner* and *John Snelſon* prove, that when Sir *Edward Fitton*, upon his Death-bed, was ſollicited by Earl *Rivers* and Mr. *Davenport*, to ſettle his Eſtate upon the Lord *Gerrard*, he abſolutely refuſed it. And *John Cowley* and another, proves, that when the Earl of *Dorſet*, and Earl *Rivers* at *Oxford*, at ſeveral times, about three Months before his Death, importun'd Sir *Edward Fitton*, to ſettle his Eſtate on the Lord *Gerrard*; he made anſwer, he could not do it, having ſettled it before on the *Fittons*: Which is, in effect, a proof that Sir *Edward Fitton* own'd he had Releas'd his Power of Revocation.

As to the ſecond Head, the Witneſſes, who ſpoke poſitively to the Will, were two, Dr. *Smallwood* and *Hollingſhead*. *Smallwood*

Smallwood being Examined as a Witness, in a Cause in Chancery, between the Co-heirs and Mr. *Fitton*, did Depose, that he knew not of any Settlement made by Sir *Edward Fitton*, by Deed, Will, or otherwise; which Oath of his must be false, if he had at that time the Will in his Doublet, where he pretended to have carried it seventeen Years.

2. Whereas (according to the Settlement) *Edward*, the Eldest Son of *William Fitton*, at his Age of fourteen Years, tendred himself to marry the Lord *Brereton*'s Daughter; *Smallwood* being then his Domestick Chaplain, perswaded the Lord *Brereton* to marry his Daughter to him, which he could not do, without the basest Infidelity, if he knew the Estate was given away from the *Fittons*.

As to *Hollingshead*, he was the Person who treated a Marriage between *Edward*, the Eldest Son of *William Fitton*, and the Daughter of *William Jolliff*, Esq; (which was prevented by *Edwards* Death) and who after treated a Marriage between the Petitioner and the Daughter of *Thomas Jolliff*, Esq; and upon both those Treaties, he constantly affirmed the Title of the *Fittons* under the Settlement.

2. After the Marritge had taken effect, he pressed the Petitioner for a Lease of a Farm, part of the Lands in question, aud offered a considerable Fine for such Lease, which he would not have done, if he knew the Petitioner had no Title, and he often affirmed that he was present when Earl *Rivers* press'd Sir *Edward Fitton*, to settle his Estate on the Plaintiff; which he refused.

He also advised others to renew their Leases from Mr. *Fitton*, which they did thereupon.

And notwithstanding, it is alledged with so much assurance, that the Will was clearly Proved at the Tryal at *Chester*, Sir *Job Charlton* (before whom the Cause was Tryed) directed the Jury that they ought to have no regard to *Hollinshead*'s Testimony, as a Person not credible, and that the only Evidence for the Will was Dr. *Smallwood*, if they did believe him.

As to the rest of the Witnesses, who speak to *Hollingshead*'s Report, their Testimony falls together with *Hollingsheads*.

'Tis true, there was an Information of Perjury Exhibited against *Smallwood* and *Hollingshead*, but Mr. *Fittons* most material Witnesses, being then beyond Sea, when the Cause was to be Tryed, and the Court refusing to put off the Tryal, no Evidence at all was given, and the Defendants acquitted of course.

As to that Objection, which may at first seem plausible, that it will be a hardship upon the Earl, to come to a Tryal after so long a time, if it be examined, it will appear to have no weight in it. For the Question being upon the reality of the Will, and the Earl's Witnesses having been all Examined, their Depositions remain for his advantage, and they cannot be cross-examined by the Court, which they might have been, if they were yet alive, and that is only to the disadvantage of Mr. *Fitton*.

There is no time of limitation fixed in case of an Appeal from an Erroneous Decree. In this Case the Plaintiff and Defendant are still living: Mr. *Fitton* has been a Prisoner, almost ever since the Decree, but has made Entries and Claims on Record from time to time, though under a disability, not only to Prosecute this Suit, but another Suit upon a Mortgage of part of the Lands in question, which he might have done, (if able) at a much less charge than bring on this Cause.

The Tryal had at *Chester* is much insisted on, but if the Fact were stated, would have little weight with it.

Mr. *Fitton* was then a Prisoner, the Sessions appointed in Term-time, all the Principal Councel below retain'd by the Earl, and Mr. *Fitton* could get no Councel in *London*, to leave the Term to go to that Tryal; nor could he prevail with divers of his material Witnesses to go down. All which appears, by several Affidavits made in Chancery, before the Tryal, and in order to put if off. And at the Tryal, he lost the use of several Witnesses who were dead, being not suffered to read their Depositions, because the Bill and Answer in the Cause were forgotten to be brought down, as appears by another Affidavit made in the same Court for a new Tryal.

The Ld Anglesey speech to ye house of Lds